

**California Oilfield Maintenance, Inc. d/b/a Robbins Engineering and Local Union No. 460 of the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO. Case 31-CA-18828**

June 9, 1993

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND RAUDABAUGH

The principal issue is whether the Respondent unlawfully warned and discharged nine employees for engaging in protected concerted activities.

On January 29, 1993, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions. The General Counsel filed cross-exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

**ORDER**

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, California Oilfield Maintenance, Inc. d/b/a Robbins Engineering, Bakersfield, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup> The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Bernard Hopkins, Esq.*, for the General Counsel.  
*Russell S. Brown III (Russ Brown Associates)*, of Anaheim Hills, California, for the Respondent.  
*Eugene Miller, Esq.*, of Seaside, California, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

WILLIAM L. SCHMIDT, Administrative Law Judge. Local Union 460, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Union) filed an unfair labor practice charge against California Oil Field Maintenance, Inc. d/b/a Robbins Engineering (Company or Respondent) on May 8, 1991.<sup>1</sup>

<sup>1</sup> All dates refer to the 1991 calendar year unless shown otherwise.

On June 28, the Regional Director for Region 31 of the National Labor Relations Board (NLRB or Board) issued a complaint alleging Respondent had engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the National Labor Relations Act (Act). The gravamen of the complaint is that Respondent unlawfully warned and discharged nine employees on April 29.

Respondent answered the complaint on July 12 denying that it engaged in the unfair labor practices alleged.

I conducted a hearing on the matter as joined on April 22 and 23, 1992, at Bakersfield, California. After carefully considering the record, the demeanor of the witnesses, and the posthearing brief filed by the General Counsel, I find Respondent engaged in certain unfair labor practices alleged based on the following

**FINDINGS OF FACT**

**I. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Pleadings*

The complaint alleges that nine company employees engaged in a concerted work stoppage on April 25 and that, thereafter, the Company issued written warnings to each employee engaged in that work stoppage. The complaint further alleges that the Company discharged the same nine employees on April 29 because of their union and protected concerted activities.

Respondent's answer, as amended at the hearing, admits the preliminary jurisdictional and agency allegations of the complaint but denies that it engaged in the unfair labor practices alleged. The answer contains no affirmative defenses but Respondent, without objection, proffered evidence at the hearing that one involved employee, Harold Sisemore Jr., was an independent contractor, and that two other involved employees, George Ferguson and Michael Flowers, quit their employment with Respondent.

*B. The Evidence*

**1. Background**

Respondent, a California corporation which maintains its principal place of business at Newhall, California, is engaged in general engineering contracting services in area oilfields.<sup>2</sup> During the period at issue, Respondent maintained an office in Bakersfield, California, managed by Ron Paulk. The dispute itself arose at Respondent's construction site located on Mobil Oil Company's Moco Lease, a large oilfield about 50 miles southwest of Bakersfield between Taft and Maricopa, California.

Mobil and Respondent entered into a contract for work at the Moco Lease in late January. That contract called for the commencement of work in mid-February and its completion in the latter part of June. Essentially, the work was located in two areas of the Moco Lease about a mile apart from each other which came to be designated as the K-Zone and the H-Zone. Respondent designated separate foremen to oversee

<sup>2</sup> Respondent concedes the Board's jurisdiction in this matter. Its indirect inflow annually exceeds the dollar volume established by the Board for exercising its statutory jurisdiction over nonretail enterprises. Accordingly, I find that jurisdiction to resolve this labor dispute lies with the Board.

work in the separate zones, James Aldridge in the H-Zone and Irving (Muff) Yocum in the K-Zone. Paulk, Aldridge, and Yocum are supervisors and agents within the meaning of the Act.

Among other items, the contract called for the installation of a considerable amount of pipe requiring the services of a number of pipe welders. By the time the events giving rise to this dispute arose on April 25, Respondent had hired a crew of about 15 rig-welders<sup>3</sup> as well as a similar number of welder-helpers and a few other craftsmen so that its total employee complement at the Moco Lease site exceeded 30 employees. Paulk, it appears, hired all employees for the Moco Lease job from a variety of sources.

In the days preceding the events described below, several of the rig-welders had executed cards authorizing the Union to act as their collective bargaining representative. On April 24, or immediately prior to the events relevant here, the Union filed a representation case petition at NLRB Region 21 in Los Angeles and actual service of the petition on Respondent was completed on April 26.

## 2. The relevant April 25 events

About 9:30 a.m. on Thursday, April 25, an oil-head located about half a mile to the north of the K-Zone blew out. A geyser of oil, steam, and paraffin particles resulted which reached several hundred feet in height. The prevailing winds caused a mist of this mixture to drift southward over a part of the K-Zone.

Orville Burks, a company rig-welder, was in the affected K-Zone area and witnessed the eruption of the geyser. He soon noticed the mist of oil and paraffin falling in the area where he was working and became concerned about the presence of poisonous hydrogen sulfide gas in the mixture.

Shortly thereafter, Donald Jones, another rig-welder reassigned to a location near Burks, arrived to start work. Burks immediately called Jones' attention to the geyser and the mist of material falling in the area where they were located. Jones said that Burks pointed to oil beading up on the hood of his truck and shortly Jones noticed a fine oil mist was coating his shirt, glasses, hands, truck "and everything else that was in the vicinity."

By the time Jones realized what was going on, Aldridge and Yocum had arrived in the area. Jones promptly approached to two supervisors to find out if they expected him to work in the oil mist which he considered unsafe. Even by Aldridge's account, Jones stated that he could not work under such conditions and asked what they wanted him to do. Aldridge's testimony concerning the response to Jones is as follows:

Q. Okay, and did you respond to him . . . at that time?

A. Muff looked at me, and he said, "Well, what do you think? What can we do James?"

And I told Muff—I didn't actually state it to Donnie. I said, "Muff," I said, "if he can't work in this oil—" and there was no other place we could move him

cause all the welders had the spots taken up. I said, "I guess we just have to roll him up to go to the house."

And he interpreted that that I was firing him, but I did not. Did not mean that at all. And I even went—then he blew up and went to cussing and stomping, you know, mad, cause he just—thought he just got fired.

And I went up to Donnie then and I tried to explain to him. I said, "No, Donnie, you don't understand. This means you can go home for today." But there was no talking to him at this point. It was just a miscommunication problem, I guess.

Jones provided a similar account. However, Jones asserted that the attempt to convince him that he had not been fired did not occur until somewhat later after he had told some other welders about the ultimatum and they, too, decided to join him in leaving the job site. Moreover, Jones asserted his belief that work was available in several unaffected areas. Regardless, nine of the welders left the jobsite that morning as a result of the confrontation between the two supervisors and Jones. They were: Jones, Burks, Gary Patterson, Curtis Taylor, Rick Arlos, Agee Holloway, Mike Flowers, George Ferguson, and Harold Sisemore Jr.<sup>4</sup>

Paulk said that he learned of the walkout shortly before noon on April 25 through a telephone call from one of the job supervisors. He left for the job immediately. As he approached the entrance to the Moco Lease, he saw four of the welders' trucks parked along the roadway so he stopped briefly to ask that they move their trucks and to find out what was happening. At this time he learned about the oil spray which was still in progress when he later surveyed the site.

After speaking with the employees who had remained at work, Paulk visited with Jack Merrill, a Mobil field manager at the site. Paulk said that Merrill was very concerned about the walkout because of the effect it would have on the work schedule. Paulk assured Merrill that he would get the problem resolved.

Following his visit with Merrill, Paulk returned to his office in Bakersfield. That afternoon Arlos, Patterson, Holloway, Burks, Taylor, and Ferguson came to his office to discuss the situation. Flowers joined the discussion later; Jones and Sisemore did not participate in this conference. After discussing the situation and assuring the welders that Jones had not been fired, Paulk said that they managed to "patch things up . . . and they were more than willing to come back to work." In accord with an earlier arrangement made with Merrill, Paulk instructed the welders to report the following morning (Friday) and work until they had made up the time lost from the walkout.

After the welders departed, Merrill telephoned Paulk to cancel plans for work on Friday because Merrill had decided that "[i]t's . . . not worth my time and maybe not worth

<sup>3</sup> A rig-welder, as used here, refers to a welder who supplies his own welding equipment, essentially a truck-mounted welding machine and the attendant welding paraphernalia.

<sup>4</sup> Sisemore and Ferguson appear to have been working a substantial distance from the other welders and were unaware that a walkout had occurred until they were told about it by Aldridge and Yocum at about 11 a.m. According to Sisemore, one of the supervisors asked if they were "going to leave too" and he responded that they would "probably . . . leave in support of it too." Sisemore testified: "[W]e said we were not going to quit, that we would come back once things were straightened out, but we would leave in support of the other welders."

theirs.” Merrill also suggested that, by waiting until Monday to start again, the added time would provide a greater opportunity for the welders to “cool down.”

Fearing that he would be unable to reach all the welders by telephone, Paulk went to the Poorhouse Bar, a local tavern frequented by the welders. He located Arlos, Patterson, and Taylor there and informed them of the change in plans. They agreed to pass the information on to the other welders.

That evening Paulk said that he received a telephone call from Sisemore who said that he had learned the other welders would be allowed to return to work and inquired about his status. Paulk told Sisemore that he was “really upset” with him because he had walked off after working only 4 hours and in a location which was unaffected by oil geyser. Accordingly, Paulk told Sisemore at that time that “I am not going to use you.”<sup>5</sup> No evidence indicates that Paulk had informed the group of welders who met in his office earlier that afternoon of his intent to terminate Sisemore if, in fact, he had formulated such an intention at that time. However, this information was transmitted to Foreman Yocum at some time prior to his reporting to the jobsite the next Monday morning.

### 3. The relevant April 29 events

On Monday, April 29, all the welders who had walked out the previous Thursday reported for work at the regular time, including Sisemore.<sup>6</sup> The first item on the agenda was a regular safety meeting conducted primarily by the Company’s safety director. Toward the end of the meeting, which lasted between 30 and 45 minutes by most estimates, Merrill and a Mobil safety representative appeared at the meeting and witnessed the events which followed.

According to Yocum, the nine welders paid only scant attention to the safety meeting; he said they were congregated in a separate group engaged in their own discussions but he made no effort to interfere for fear of provoking the group again. When the meeting concluded, Yocum called out for everyone to go to work.

Thereafter, Yocum was approached with an inquiry about Sisemore’s status.<sup>7</sup> Yocum’s testimony about what occurred at that time is as follows:

Q. Okay, now, at some point after this [Yocum’s call for the employees to go to work], there was a question about Harold Sisemore, is that correct?

A. Yes, there was. One of the people I mentioned, Pat Patterson, came over and addressed me and said,

<sup>5</sup> By Sisemore’s account, this conversation occurred the following morning but otherwise his testimony concerning its substance does not vary significantly from Paulk’s version.

<sup>6</sup> Following his conversation with Paulk, Sisemore telephoned Flowers with the report of his discharge. Flowers expressed a modicum of disbelief and promised to call Sisemore back. When Flowers did so, he told Sisemore that he was to report to the job with the rest of the crew on April 29.

<sup>7</sup> Initially, Yocum said Patterson first approached him about Sisemore. In the testimony quoted below, however, Yocum eventually expressed some doubt whether Patterson or one of the others initiated the Sisemore question. Ferguson claimed that he raised the Sisemore issue with Yocum. Although this divergence is of little or no consequence, it seems probable that Ferguson’s recollection is more likely correct as he had been practically the only welder who ever worked close to Sisemore. Patterson did not testify.

“Ronnie [Paulk] said that all the welders, all of us were coming back to work.”

And I said that, “Ronnie told me all of you were to come back to work with the exception of Harold Sisemore.” And he [Patterson] told me, “We need to have more of the little meeting. I’ll let you know in a few minutes for going back to work.”

Q. Okay, and so what did you do next?

A. I called Ronnie on the phone and told him of the events that happened and said that I thought that everything was resolved, and I told him that they were having their own little meeting, and I didn’t know if it was resolved or not, and I was worried about how it was going to affect the job because there’s deadlines on the jobs and schedules that Mobil’s asking you to meet, and the Mobil guys that I said came towards the last of the meeting were there, and they were asking me what the problems were, this or that. And I explained all that to Ronnie.

Later, on cross-examination, Yocum added some clarity about the Monday morning events:

Q. And are the welders all being paid for this time [during and after the safety meeting]?

A. If they’re coming back to work. That was what—my question. I didn’t understand what the meeting was about, and then Pat Patterson when he said, We need to finish our little meeting, and we’ll let you know whether we’re coming back to work or not,” I didn’t—you know, I was still in the dark whether they were coming back to work. I didn’t really know what was going on. I thought they were just coming back to work normally, that the situation from before was resolved, and we were just going to go ahead with the job.

Q. Couldn’t have been one of the other guys. You remember it was Patterson.

A. I remember Patterson was the one that asked me—told me that we need to have the little meeting. I’m not—I can’t remember which one it was that asked me if [Sisemore] gets to go back to work. I believe that was Patterson to[o].

But Patterson is the one that addressed me and said, “We need to have a little bit more of a meeting, and I’ll let you know if we’re going back to work.”

Q. Did he tell you what the meeting was about?

A. No.

Q. Did you ask?

A. I—I didn’t ask what the meeting was about. They told me that they had a problem with that because Harold Sisemore wasn’t allowed to go back to work. So I took for granted that that’s what it was about.

Yocum estimated that he placed his initial phone call to Paulk about 6:40 a.m. Some 20 minutes later he placed another phone call to Paulk in order to report that the protesters still had not concluded their meeting and returned to work.<sup>8</sup> Paulk told Yocum that he was leaving for the jobsite immediately. Shortly after Yocum concluded this call, the protest-

<sup>8</sup> While the welder’s mulled the Sisemore matter, each of their helpers literally had nothing to do and, hence, were also idled.

ers ended their meeting and Patterson reported to Yocum that they were returning to work without Sisemore. Sisemore said that he urged the welders to return work to avoid jeopardizing their own welfare.

However, two welders, Ferguson and Flowers, asked for and received permission from Yocum to leave in order to purchase guards for their grinders in light of an announcement at the safety meeting that morning to the effect that welders would not be permitted to work without them.<sup>9</sup> Both returned to Bakersfield for this purpose, almost an hour's driving time one-way.

Paulk said that he "was pretty well disgusted with the situation" after Yocum's second phone call. He attempted to learn what had occurred when he arrived at the Moco Lease site that morning and met several times with Mobil officials who pressured him to solve the welder's problem or risk removal as a contractor on the site.

In addition, Paulk said that the Mobil officials expressed concern about potential sabotage by the welders and notified him that they planned to start x-raying welds almost immediately. For that reason, Paulk instructed Yocum to halt the welders' work for the day and have them report to the Bakersfield office the following morning, a departure from their routine of reporting directly to the Moco Lease site.

When Yocum later testified, no inquiry was made concerning the midmorning cessation of work on April 29. Apparently, some of the welders either were told outright they were being terminated at that time or reached that conclusion from the circumstances. Enroute back to the Moco Lease after purchasing grinder guards, both Ferguson and Flowers encountered some fellow welders who reported that the crew had been fired. Consequently, neither Ferguson nor Flowers returned to the job that morning.

Nonetheless, Paulk claimed that he did not reach the decision to "replace" the eight welders who delayed returning to work that morning until after he had returned to his office from the Moco Lease on April 29. By his account, the welders would have first learned of their terminations when reporting to the Bakersfield office the following morning. Of the eight, only Ferguson and Flowers failed to report on the morning of April 30; they stopped at the office later in the week for their final checks.

On the afternoon of April 29, Paulk prepared termination notices for all nine of the welders who engaged in the April 25 walkout and the April 29 jobsite meeting. Six of the three-page termination packets—those of Arlos, Burks, Holloway, Jones, Patterson, and Taylor—are virtually identical. On each of these six termination notices, the listed reason for termination is: "Insubordination on 4/25/91 & 4/29/91 noncompliance with C.O.M.I. supervisors." Two employee incident reports—one dated April 25 and the other dated April 29—were appended to these termination notices. The former describes the April 25 walkout, lists eight of the nine employees involved, and warns that termination will result if the conduct "should happen again." The latter notes

<sup>9</sup>Many experienced welders, such as several here, routinely remove the safety guards after purchasing new grinders and throw them away as they find the guards to be a nuisance while working. Apparently, however, the Company's safety director went to some length at the April 29 safety meeting to stress the importance of the guards and the potential liability to the Company and the welder should a helper suffer injury from an unprotected grinder.

that the welders "met off to the side after the [the April 29 safety] meeting, discussing what they should do about a welder that was replaced on 04-25-91" for approximately 1 hour and failed to comply with the directions of their supervisors to return to work.

Sisemore's termination documents are identical except that the reason for termination listed on his employee termination notice states: "Quit—Rolled Up" and his departmental designation is listed as "Subcontractor." The same two employee incident reports were appended to his termination notice.

The employee termination notices of both Flowers and Ferguson likewise reflect that they quit. The employee incident reports dated April 25 and April 29 were appended to Flowers' termination notice but not to Ferguson's. In fact, Ferguson is not named on any of the incident reports of the other employees as a participant in the walkout. Of the nine employees terminated, only Flowers, regarded by Paulk as a close personal friend, was deemed eligible for rehire.

Paulk testified that his decision to terminate the welders was based on Mobil's threats to terminate the Company's contract for failure to meet the the job schedule; the welders' lack of attention at the April 29 safety meeting; the welders' failure to return to work immediately after the safety meeting as ordered; and his concern about potential sabotage by the welders.<sup>10</sup>

#### 4. Sisemore's status

Sisemore is a licensed contractor although he has never worked as a contractor. When he applied for employment with Respondent, he applied for work as a "contract welder," a term, according to Sisemore, which is used interchangeably with "rig-welder" in the industry.

As a matter of policy, Respondent will not pay welders it employs by split check if the welder has a contractor's license. Thus, Paulk testified:

[I]f I know he has a contractor's license, I will not hire him as a split check. He will automatically be hired as a independent contractor. It's just a policy we have as an internal policy of our Company that if they have a license, they're going to use it.

Hence, Sisemore was paid for the limited time he was employed by Respondent on a single check at the rate of \$35 per hour with no tax deductions. Other welders were compensated on a split check system; they were paid \$12 per hour for labor with the usual employee tax deductions and \$20 per hour, without deductions, for rig rental.

Paulk said that Sisemore did the same work with the same supervision as other welders the Company employed on the Moco Lease project. When Sisemore started at the Moco Lease on April 25, he was led to the site by Yocum and turned over to Aldridge who assigned him to work with, or in the vicinity of, Ferguson who was concededly an employee. Paulk said that Sisemore would not have been free

<sup>10</sup>Paulk implicitly acknowledged that no knowledge of sabotage existed when the welders were terminated but asserted that a welding machine carburetor and some timbers were later found "inside a pipe that one of the nine welders were working on." Because this largely unsubstantiated claim was unknown at the time of the discharges, I have accorded no weight to it.

to hire his own employees for the project without his approval. Sisemore testified that he was bound by the work hours, breaks and lunch periods established by the Company and otherwise lacked the freedom to decide on the order of tasks he was assigned to perform.

### C. Further Findings and Conclusions

#### 1. Sisemore's status

Sisemore's status is a significant threshold issue. Section 2(3) of the Act defines the term "employee" to include any employee . . . and shall include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . but shall not include . . . any individual having the status of an independent contractor." General agency principles, paramount among which is the "right-to-control," apply to the determination of whether an individual is an employee or independent contractor.<sup>11</sup> The right-to-control test is often summarized in this fashion: If the person for whom the services are performed retains the right to control the manner and means by which the results are to be accomplished, the person who performs the services is an employee; if only the results are controlled, the person who performs the services is an independent contractor.<sup>12</sup>

Viewed in context, the Company's claim about Sisemore's status would mean that the welders' work at the Moco Lease project on April 25 was performed by a crew which consisted of 14 welder employees, 15 welder-helper employees, and Sisemore, an independent contract welder. This perspective alone raises some reasonable skepticism.

Although Sisemore readily admitted that he possessed a contractor's license, he asserted that he had never before worked as a contractor. Because Sisemore worked as a part of an integrated crew at the Moco Lease, he necessarily lacked control over his hours of work, including break periods and lunchtimes. Sisemore's lack of authority to hire his own employees without prior company approval is also indicative of a narrowed degree of control possessed by him on this job. Likewise, Sisemore concededly was subject to the same supervision as other employees and testified without contradiction that he lacked authority to even prioritize assigned tasks. Put another way, he plainly understood that he was expected to do precisely what his foreman told him to do.

Furthermore, any opportunities for earnings or profit under the system in effect at this jobsite were limited solely by the number of hours actually worked and Sisemore's hours of work were strictly controlled by the Company. As the welders owned their own welding rigs, they obviously had an opportunity for other earnings outside their regular Company work hours but the outside opportunities available to Sisemore were no different than those available to all rig-welders. Moonlighting by skilled tradesmen and small business entrepreneurial activity are not synonymous.

Little or no significance can be attached to the fact that Sisemore furnished his own welding rig; even those welders who are conceded to be employees furnished the same equipment on a rental basis, a common industry practice. The

Company provided the same ancillary equipment to Sisemore and all other welders.

The mere fact that Sisemore held a contractor's license played no part in the nature or scope of the duties assigned to him and vested him with no characteristics which would distinguish him from the other welders while actually at work on the Moco Lease project. The terms of compensation and all other conditions of work were unilaterally set by the Company. Sisemore was free only to take it or leave it.

This Company's policy of seizing on the mere possession of a contractor's license to determine the manner of payment for services rendered, i.e., single check with no deductions vs. split payments with deductions from one portion, is no substitute under the right-to-control test for relinquishing actual control to the service provider for determining the manner and means of achieving the results desired.<sup>13</sup> As Sisemore clearly lacked the right to control the manner and means of the services he performed for Respondent, I find that he was an employee and not an independent contractor.<sup>14</sup>

#### 2. The alleged unfair labor practices

These factual conclusions are overwhelmingly supported by this record: (1) Eight of the Company's welders engaged in a concerted work stoppage on April 25 to protest the Company's insistence that Donald Jones either work in the ongoing oil shower or "roll-up and go to the house"; (2) Sisemore was discharged on April 25 for engaging in the work stoppage that day; (3) on April 29 eight of the welders either continued the prior work stoppage or commenced a new one while they decided among themselves whether or not they would work in view of Sisemore's April 25 discharge; (4) the eight welders who participated in the April 29 work stoppage were discharged on April 30 for having done so; (5) the Company's knowledge about the Union's NLRB petition for a representation election played no apparent role in the discharge of nine welders at issue.

Section 7 of the Act, establishes the right of employees "to engage in . . . concerted activities for the purpose of . . . mutual aid or protection." Section 8(a)(1) protects this right by making it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7." Further pertinent here is Section 2(9) which defines a labor dispute as "any controversy concerning terms, tenure or conditions of employment" and Section 2(3) which, as seen above, defines an employee to include employees whose work has ceased due to a labor dispute.

Unrepresented employees who engage in a peaceful work stoppage to protest unacceptable working conditions or the termination of a fellow employee are engaged in concerted activity within the meaning of Section 7 and a labor dispute within the meaning Sections 2(9) and 2(3) of the Act, and

<sup>11</sup> *Associated General Contractors*, 280 NLRB 698, 701 fn. 6 (1986).

<sup>12</sup> *Fort Wayne Newspapers*, 263 NLRB 854, 855 (1982).

<sup>13</sup> See generally *Glaziers Local 513 (Custom Contracting)*, 280 NLRB 974 (1986), in which the Board determined that nominal partners in that company were simply routine supervisors and employees based on evidence showing that they rarely, if ever, exercised true partnership control. Form without substance lacks legal significance.

<sup>14</sup> *R. L. Stott Co.*, 183 NLRB 884, 885 (1970).

employers who discharge workers for engaging in this activity protected by statute violate Section 8(a)(1) of the Act.<sup>15</sup>

The factual parallels between the origins of this dispute and the dispute in the seminal *Washington Aluminum* case are virtually indistinguishable. Both here and in that case the walkout followed an assertion by a single employee about the immediate working conditions, here an oil mist and there a cold, unheated plant. Here one employee, Jones, complained about the oil mist and was given the option of working in the mist or going home; there one employee accepted his foreman dare and announced that he was leaving rather than working in an unheated building. In each case, as others learned of the protest on the part of their fellow worker, they joined in leaving work.

In light of the foregoing factual findings concerning the nature of this the April 25 walkout, Respondent unquestionably violated Section 8(a)(1) by its discharge of Sisemore for his participation in that walkout. Subsequently, the refusal of Thursday's remaining protesters to return to work until they resolved among themselves whether to go back to work without Sisemore precipitated—as shown conclusively by Respondent's own April 29 employee incident reports—their discharges the following morning.<sup>16</sup> As the remaining eight employees were discharged for engaging in a work stoppage that concerned the continued employment of one of the original protesters, I further find that Respondent violated Section 8(a)(1) of the Act by that action. Likewise, the April 25 employee incident reports which warn that employees will be terminated for engaging in further work stoppages similar to the protected work stoppage that day also violate Section 8(a)(1) of the Act.

In reaching the foregoing conclusion concerning the April 30 discharges, I reject the claim made at the hearing that Ferguson and Flowers quit. Both testified without contradiction that they were granted permission by Yocum to absent themselves from the job on April 29 to buy grinder guards.<sup>17</sup> Their failure to return to the job that day resulted from news received from other employees that they had been fired. Even by Paulk's account, no work would have been available if they had returned to the Moco Lease on April 29.

<sup>15</sup> *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Quality C.A.T.V.*, 278 NLRB 1282 (1986); *Go-Lightly Footwear*, 251 NLRB 42 (1980).

<sup>16</sup> Sisemore's termination was obviously the focus of the Monday morning group discussions. The evidence strongly suggests that most of the employees learned for the first time that morning that not all of Thursday's protesters would be returning to work as Paulk had promised. Hence, even if they were grouped together in their own discussion of this matter during the safety meeting as the Company's witnesses charged, I find that fact of no moment here. Rather, it is merely indicative of the fact that the work stoppage was continuing (or beginning anew) with the publication of the news regarding Sisemore. However, it is noteworthy to observe that the employee incident reports state that the Monday morning group meeting occurred "after" the safety meeting.

<sup>17</sup> Yocum claimed only that he could not recall giving Ferguson and Flowers permission to go buy grinder guards. I have credited Ferguson and Flowers on this point not only because of Yocum's failure to clearly contradict their claim but also because of the probability that they left for that reason in light of the safety directive announced on the morning of April 29 and because of their obvious certainty while testifying about their absence that day.

But more importantly, Paulk initially testified that he decided to "replace" all eight on the afternoon of April 29.<sup>18</sup> The employee incident report he prepared for Flowers corroborates this initial testimony as it reflects, contrary to the accompanying employee termination notice, that Flowers, like the other protesters, was being terminated for participating in the April 29 work stoppage.

Apparently no employee incident reports were ever prepared for Ferguson and his name is not listed among those who engaged in the walkout on the employee incident reports prepared for either April 25 or 29. However, both Sisemore and Paulk confirm that Ferguson participated in the April 25 walkout.<sup>19</sup>

Paulk claimed that both Flowers and Ferguson quit and that he received inquiries later in the week of April 29 from new employers asking for an evaluation of their work. Both denied they worked for the identified employers following their employment with the Respondent.

Considering all the extant circumstances, I find that Respondent's claim that Ferguson and Flowers voluntarily quit to be little other than a disingenuous afterthought, worthy of no credit, probably resulting from the fact that neither reported to the office on the morning of April 30 to receive official notification of their termination. This conclusion is strongly supported by Paulk's initial testimony that he decided to terminate all of the remaining protesters on the afternoon of April 29, the Flower's April 29 incident report reflecting that he was being terminated, and the unusual lack of effort on Paulk's part to communicate contrary information to Ferguson even though he would have been clearly in need of welders after discharging two-thirds of the crew.

Apart from timing, no evidence exists to support a causal relationship between the filing and service of the representation petition and any of the discharges here. In view of that fact, and indisputable evidence that the discharges were motivated by the walkout, I find that General Counsel's 8(a)(3) allegation lacks merit.

## II. THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth above, occurring in connection with Respondent's business operations, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

## CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>18</sup> The word "replace" was chosen by Respondent's counsel in framing his question. In fact, Paulk discharged all eight before he replaced any of them.

<sup>19</sup> Sisemore said that Ferguson joined him in leaving the job and they later met with others who walked off on April 25 at a local restaurant. Paulk said that Ferguson was present for his meeting with the protesters at his office on the afternoon of April 25. Insofar as is known, those welders who did not join the walkout on April 25 continued to work throughout that day.

3. By threatening to terminate employees for engaging in activities protected by Section 7 of the Act in the form of its employee incident reports dated April 25, 1991, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discharging Harold Sisemore Jr. on April 25, and by discharging Rick Arlos, Orville Burks, George Ferguson, Mike Flowers, Agee Holloway, Donald Jones, Pat Patterson, and Curtis Taylor on April 30, Respondent engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

5. The General Counsel failed to establish that Respondent engaged in any unfair labor practice within the meaning of Section 8(a)(3) of the Act.

6. The unfair labor practices of Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

#### REMEDY

Having found that Respondent has engaged in certain unfair labor practices, the recommended order requires Respondent to cease and desist therefrom and to take the following affirmative action designed to effectuate the policies of the Act.

The Board's typical order in unlawful discharge cases requires the offending employer to offer immediate reinstatement with backpay and interest. Notwithstanding that the Respondent's Moco Lease project, where the affected employees were employed, is now completed, a reinstatement and make whole remedy is appropriate. This is especially true where, as here, preliminary discussions had occurred between Respondent's supervisors and some of the affected welders concerning future employment opportunities with Respondent. Implementation of the reinstatement and backpay order at the compliance stage of this proceeding shall be governed by the Board's decision in the *Dean General Contractors* case.<sup>20</sup>

In the event it is determined during the compliance proceeding that reinstatement is appropriate, Respondent must immediately offer in writing to reinstate each unlawfully discharged employee for whom reinstatement is deemed appropriate to his former position or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority or other benefits. Respondent must also make the employees unlawfully discharged here whole for the loss of pay and benefits suffered by reason of their unlawful discharge. Backpay, if any, shall be computed on a quarterly basis as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Amounts due trust fund accounts on behalf of any unlawfully discharged employee here shall be determined in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondent must further expunge from any of its records any reference to Sisemore's April 25 discharge and the April

30 discharges of the other eight employees at issue in this case, including the April 25 employee incident reports. Each of the discharged employees must be notified in writing that such action has been taken and that any evidence related to that discharge will not be considered in any future personnel action affecting him. *Sterling Sugars*, 261 NLRB 472 (1982).

Finally, as the Moco Lease project has been completed, Respondent will be required to mail the attached notice to the currently known addresses of all employees employed by it at the Moco Lease project during 1991 in order to inform those employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>21</sup>

#### ORDER

The Respondent, California Oilfield Maintenance, Inc., d/b/a Robbins Engineering, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees for engaging in concerted activities protected by Section 7 of the Act.

(b) Threatening to discharge employees for engaging in concerted activities protected by Section 7 of the Act.

(c) In any like or related manner interfering with, restraining, coercing, or discriminating against employees because they exercise rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately offer to reinstate Rick Arlos, Orville Burks, George Ferguson, Mike Flowers, Agee Holloway, Donald Jones, Pat Patterson, Harold Sisemore Jr., and Curtis Taylor, and make each whole for all losses incurred as a result of their April 1991 discharges as specified in the remedy section of this decision in this matter.

(b) Expunge from its records any reference to the April 1991 discharges of those employees named in paragraph 2(a), above, including the April 25, 1991 employee incident reports, and notify each of those individuals in writing that such action has been taken and that his April 1991 discharge will not be used in any future personnel action involving him.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to determine the propriety of any offers of reinstatement, backpay, and trust fund reimbursements required by the terms of this Order.

(d) Mail signed and dated copies of the attached notice marked "Appendix"<sup>22</sup> to the currently known address available to, or furnished to, Respondent of all employees employed by it at the Moco Lease project during 1991. Copies

<sup>20</sup> *Dean General Contractors*, 285 NLRB 573 (1987). In determining whether or not an offer of reinstatement is required in any particular instance and in determining the length of all backpay periods, due consideration should be accorded to the employment history, seniority, and skills of the Moco Lease welders who were not terminated on April 30 and of any welders hired to replace the unlawfully discharged welders.

<sup>21</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>22</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Mailed by Order of the National Labor Relations Board" shall read "Mailed Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

of the notice, on forms provided by the Regional Director for Region 31, shall be signed and dated by the Respondent's authorized representative.

(e) Notify the Regional Director in writing within 20 days from the date of this Order of the steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges that Respondent violated Section 8(a)(3) of the Act.

#### APPENDIX

NOTICE TO EMPLOYEES  
MAILED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

Following a hearing before an administrative law judge, the National Labor Relations Board has found that we violated the National Labor Relations Act and ordered us to post and abide by this notice.

The National Labor Relations Act provides employees with the right to engage in union or other concerted activities for mutual aid and protection on the job, or to refrain from any such activities.

WE WILL NOT discharge, or threaten to discharge, employees who engage in concerted activities protected by Section 7 of the National Labor Relations Act, to protest working conditions or the discharge of employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees because they exercise their rights guaranteed by the National Labor Relations Act.

WE WILL immediately offer to reinstate Rick Arlos, Orville Burks, George Ferguson, Mike Flowers, Agee Holloway, Donald Jones, Pat Patterson, Harold Sisemore, Jr. and Curtis Taylor to their former positions, and make them whole for all wages and benefits, together with interest thereon, they lost as a result of their April 1991 discharges to the extent provided by law.

WE WILL notify Rick Arlos, Orville Burks, George Ferguson, Mike Flowers, Agee Holloway, Donald Jones, Pat Patterson, Harold Sisemore Jr., and Curtis Taylor in writing that we have expunged any reference to their unlawful April 1991 discharges, and threats to discharge, from our records and that WE WILL not rely on that discharge in any future personnel actions involving them.

CALIFORNIA OILFIELD MAINTENANCE, INC.,  
D/B/A ROBBINS ENGINEERING